

MODERNIZATION OF INTELLECTUAL PROPERTY PROTECTION TO ENSURE CONSUMERS RIGHTS

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Abstract. This article is prepared for the implementing of the project of Science Council of Lithuania “Guidelines for Citizen and Consumer Perception of Socio-Economic Justice-Making,” and the problem of the protection of the final consumer of the product is analysed.

Lithuania has borders with economic areas (countries) that have different excise and pricing policies. It is a favourable environment for contraband and counterfeiting, negatively affecting public safety and security as well as the economy. Intellectual property (IP), as a product of human creativity, is protected by law and by other means. Trademarks (TM) and other commercial brands (CB) are specific objects of industrial property. They are also an extremely important way of fighting for leadership in the market and to protect the market from counterfeits.

A few decades ago, IPR infringements were mostly harmful to the internal markets. Nowadays it is mostly harmful to international trade and its development. The problem is that we cannot overcome challenges of modern times by using traditional methods. The problems in this article are based on statistics, analysis of practical experience, there is also promotion to search for new models of management. One of these is the cooperation of state, business and civil society in coordination of this activity; the guidelines of the socially oriented model are presented.

JEL classification: O38.

Keywords: intellectual property rights, industrial property, trademarks, customs controls.

Reikšminiai žodžiai: intelektinės nuosavybės teisės, pramoninė nuosavybė, prekių ženklai, muitinės priežiūros priemonės..

1. Introduction

Due to the fast development of innovations, every new product or service is inextricably linked to the concept of intellectual property [12, 7]. Intellectual property rights (IPR) are rights to a product of intellectual activity. The conditions must be set for the subjects of intellectual property to profit from individual creative activity. An item, which reaches the market becomes a good (product). Every single object of buy-

ing or selling—including all kinds of services, works, securities—is a good and trademarks are symbols used by tradesmen, which distinguish a product from its competitors and stands as a quality guarantee.

Trademarks (TM) are specific objects of industrial property. Compared to other objects of IP (e.g. inventions, industrial design), one of their peculiarities is that trademarks are limitless in time.¹ The exclusive rights of subjects of TM are reserved for 10 years with the possibility to renew for 10 more years an unlimited number of times. The essence of branding is creation and maintenance of trust in a product—a special way to express commitment to a final consumer *of the product*. Other *commercial brands* (CB), such as geographical, origin, place of origin links, are also important in ensuring the trust of consumers. The features show up in conditions of economic globalization, liberalization of international trade:

1. *If there is a condition set for a good or intellectual product to take part in fair competition.* Credibility of TM is both an individual and social value. It explains why CB is an obvious and unique manifestation of our time. In this world, full of the slogans of competitors, rational choice became almost impossible, so TM embodies clarity, credibility, quality [23, 27].
2. *TM is an important way of creating opportunities for free and economically profitable intellectual², creative activities.* Everyone agrees that intellectual activity is a driving force for culture and civilization. In conditions of economic and cultural globalization the results of human creative activity gain an international nature. Owners or successors of IP (IP subjects) have ownership of IP objects, which are protected by IP law.
3. *TM is a trusty tool in fighting for leadership in the market or securing the market from counterfeit, because TM are protected by legal measures by creating special institutes of norms and rules, establishing special institutions.* It should be noted that a few decades ago, IP law infringements were most harmful to the internal markets whereas today these infringements are mostly harmful to the international trade and the development of it [1, 238].4.

With a slight deviation from the main problem, let us remind you that international protection of IPR is not a new thing at all. At the end of the 19th c., a new international regulatory mechanism was starting to develop, international agreements (still important nowadays) were signed. A regulatory document, which stands as an example for increased worldwide attention to IPR and CB protection, is The Paris Convention “For the Protection of Industrial Property”³ held in 1883 (ratified by Lithuania in 1996). Rapid economic development and progress in technologies increased interest in IP protection. In the second half of the 20th c.. this problem received even greater attention from the

¹ See the verdict of the Court of Justice in case 192/73 *Van Zuylen Freres v. HAGA G (HAG I)* [1974] ECR 731 22.

² Intellect (*lat. intellectus*—“perception, intelligence, sense”) is the capacity for understanding, thinking, and reasoning, as distinct from feeling or wishing. Traditionally considered to be a quality unique to humans.

³ The Paris Convention —20 March, 1883. Paris Convention for the Protection of Industrial Property, revised in Stockholm in 14 July, 1967 and supplemented in 28 August, 1979.

international community and important documents directly or partly speaking about CB protection were adopted. Unions which perform administration of IP are established on the grounds of international agreements. Particularly significant is the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), regulating one of the fields of General Agreement on Tariffs and Trade (GATT). This agreement was signed after a round of multilateral trade negotiations (started in Uruguay in 1986).

The introduction points out that the IPR protection problem is still topical. Economic globalization, international trade liberalization, are features of a new global civilization which extend the creative and material potential of a human being. On the other hand, economic challenges cause new threats to creative activity. Everyone agrees that these are threats to the safety of society, market and human rights. Scientific relevance is clear when we see that we cannot solve problems of IP protection using traditional measures for coexistence regulation. With this article the reader is invited to discuss a conceptual approach to IP protection, the coordination of this action by using the potential of the state, business and civil society. Problems in this article are based on statistics, analysis of practical experience, there is also promotion to search for new models of management.

2. Scale and threats of international trade, infringing IPR

A common rule is that it is forbidden to transit, export or import goods to the country's economic or customs territory if these goods infringe IPR. Actions such as illegal labelling with CB registered by other companies, copying and thus trying to mislead the final consumer (society) and to profit from it, are considered as an attempt to infringe IP. Various highly demandable goods are counterfeited: automotive parts or other devices, toys, clothes and footwear, electronics, music, sound and video recordings, beauty products, drugs, tobacco and alcohol beverages etc. There is worldwide increase in counterfeit. Counterfeit goods reach markets by using new and inventive ways. Supposedly *one-tenth of today's international trade* consists of counterfeit products. For example, in 2010 in EU €1.110.052.402 worth of goods were confiscated due to infringement of IPR, in 2011—€1.272.354.795 worth of goods. The damage of counterfeit products manifests in various aspects:

- IPR subjects do not get any profit event though their TM is used;
- original products are significantly more expensive and thus less popular in the market, and the investments made to protect the goods does not pay off to the legal manufacturer; the customer is misled and disappointed, because after buying counterfeit good he does not get the expected quality and unjustly expresses his disappointment with the legal manufacturer.
- distorts social relations, because a person who buys counterfeit products becomes a moral hostage—unwittingly contributes to the increase of illegal capital;
- Some counterfeit goods (i.e. alcohol, tobacco, pharmaceuticals, automotive parts, toys, food) often pose a threat to the health of consumers, and in some cases there is even the risk of death;

- the turnover of counterfeit goods decreases economic power and public welfare of the country, because infringers of IPR:
 - do not pay taxes;
 - do not invest in creating legal jobs;
 - cause mistrust in the quality of a product;
 - promote illegal activities;
 - increases black economy, etc.

According to the statistics of the evaluation of EU IPR protection, there are three most common categories of counterfeit: medicines, packaging materials and cigarettes (see Fig. 1).

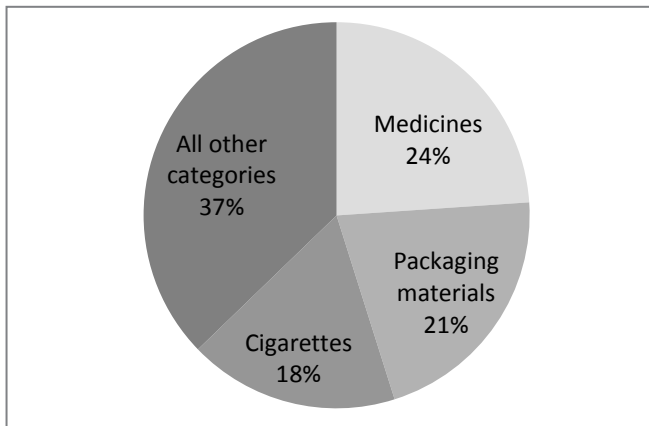


Fig. 1. Top categories by articles⁴

Lithuania, due to its location, is a transit country. It borders three countries (including the Republic of Belarus—720 km, and Kaliningrad [Russian Federation]—303 km). We also have an exit to the sea thus we face a lot of problems when ensuring CB protection in international trade. For example, counterfeits of such well-known brands as Hugo Boss, Lancome, Kenzo and others are confiscated in port of Klaipeda; there are also large cargos of perfumery, counterfeit watches detained, of such brands as Bulgari, Eberhard, Rolex, Omega and others. According to the statistics of the Customs of the Republic of Lithuania, there is a constant increase in the amount of confiscated goods (see Fig. 2) and arrests (see Fig. 3).⁵

It should be noted that the EU member states forced focus on the protection of the external borders gives significant effect and creates favourable conditions for further development of international trade principles. Nevertheless, customs and other institutions in control only partly protect IPR. For example, in 2012 at the end of August, during the general inspection in business park “Gariūnai,” the officers of Vilnius Territorial Customs and

⁴ The graph is based on the Report on EU customs enforcement of intellectual property rights. Taxation and Customs Union. Results at the EU border—2011. Publications Office of the European Union, 2012

⁵ The Paris Convention—20 March, 1883. Paris Convention for the Protection of Industrial Property, revised in Stockholm on 14 July, 1967 and supplemented on 28 August, 1979.

Vilnius Economy police confiscated approximately one and a half thousand goods, suspected of infringing IPR of owners of registered brands such as Spiderman, Barbie, Nina Ricci, Bakugan, Hello Kitty, Louis Vuitton and others. The estimated value of counterfeit goods was 250 thousand litas. Another example is that the use of illegal pesticides in farming becomes more popular. According to unconfirmed statistics, approximately 30% of the market consists of counterfeit goods. The difference in price between original and counterfeit products varies from 70 to 80 per cent. There are plenty examples of a similar kind.

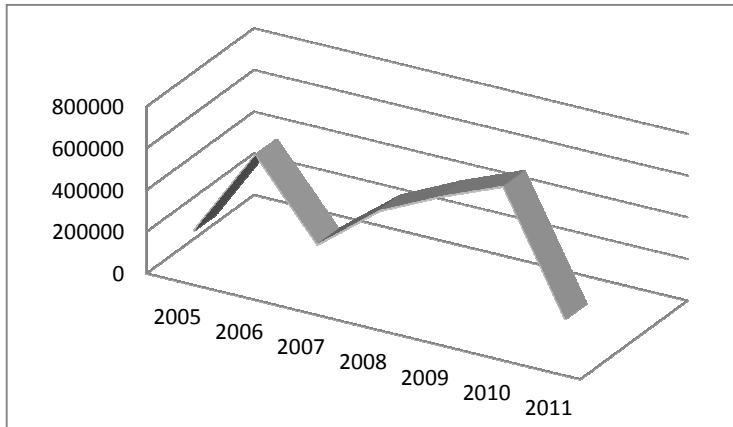


Fig. 2. Arrests by customs authorities (units), suspecting that the goods are counterfeit

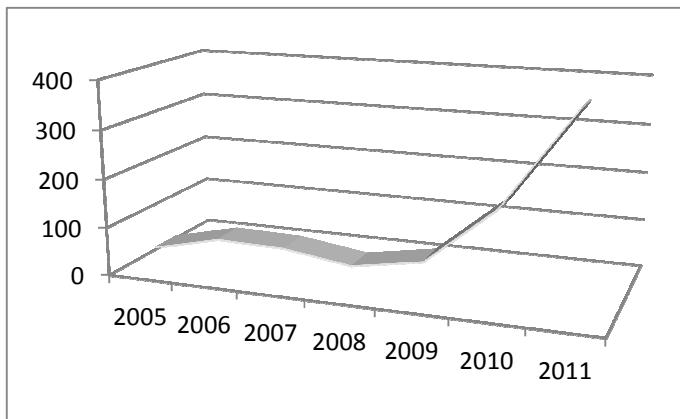


Fig. 3. Number of detentions (cases) of goods suspected of infringing IPR

It is an open secret that contraband of counterfeit original and excisable goods is one of the major problems of the economies of other members of the EU. For example, after the evaluation of IPR protection in the EU, it is assumed that illegal tobacco products fill up to 30 per cent of the EU market. Meanwhile, the situation in Lithuania is even worse. It is thought that here illegal tobacco products fill up to 45% of the market. A significant rise in counterfeit products in the market was noted since the rise of the excise tax (since 1 March, 2008, an increase in excise tax on cigarettes). State budget

loses approximately one fourth of a billion litas each year for this reason only [18, 47]. This means that illegal profit increases constantly and can make up to one fourth of a billion litas. Counterfeit cigarettes reach Lithuania in various ways. Illegal factories are being established in neighbouring EU countries, in Lithuania or in third-world countries. According to the responsible institutions, law enforcement authorities detain only a small per cent (~10%) of counterfeit goods.

Attention must be paid to another threatening circumstance, as prognosed by science. After assessing the extent of solved cases and latent illegal business, cases of IP infringements, it is presumed that international criminal gangs, which harm not only business, but also society, tend to group. Criminal cartels threaten the foundation of modern economy by receiving a large income, which later can be used to finance other criminal activities, such as drugs and arms trafficking, terrorism. This destructive activity causes social, ecological and other problems, increases threats to public safety, health, etc.

So, the question of the decrease of counterfeit goods' comparative percentage in the overall IP infringements situation scientifically and practically remains open. Scientists and practitioners should gather to make a comprehensive study of markets of Lithuania and neighbouring countries, thus getting reliable data and identifying tendencies.

Another problem is that infringements of industrial property are very specific and traditional preventive methods do not lead to expected results. In our opinion, the situation could be changed by implementing innovative models of public relations management, improving the social responsibility of market participants. Preliminary studies show that the input of such programmes or projects would be economically justified and socially significant.

3. Improvement of IPR protection implementing innovative models of public relations management

The statistic data and practical experience suggests that the question of IPR protection became relevant at the end of the 20th c. and is considered to be one of the greatest challenges for the 21st c. state, business and society in general. This lead to the improvement of a national regulation and control mechanism, increase in the organizational role of state in ensuring protection of IP, focusing on the fact that the number of people concerned with socially-just activity increases [11, 63-71; 17]. State institutions establish contacts with business and civil society organizations. The main rule of the partnership between state and business is that conditions must be set for the subjects of intellectual property to profit from individual creative activity—a guarantee of income for those who invest in the quality of a product [3, 198]. From the viewpoint of international trade this means that CB subjects must be granted an exclusive right to IP objects and the responsibility for the implementation goes to the state institutions, other social groups and organizations responsible for implementing conventional objectives of the international community.

It is understood that new management tendencies are associated with legal pre-conditions for the development of process to occur. The first EU Council Directive

(89/104/EEB) for the laws of Member States relating to trademarks was adopted on 21 December, 1988. According to Directive 89/104/EEC, the majority of problems are solved at the national level, and cross-border arrangements require improvement of the administrative capacity of institutions i.e. a democratic IPR validation and clear organizational framework for IPR protection is required from EU members.

Thematically it is important to mention *IP presence and implementation doctrine* formulated by the European Court of Justice (ECJ). The ECJ stated that Article 295 of the Treaty retains the power for a Member State to declare the existence of IPR. EC Treaty rules do not affect the conditions or the order, according to which a Member State grants the IPR **because it is a question of an existing law**. *On the contrary*, the implementation of IPR is regulated by European Community law. For example, implementation when owners of IPR and economically and legally dependant subjects (licensees) make an agreement and common decision or take concerted action. However, in this area EC Treaty Articles 81-82 provide exceptions that allow protecting the values that are important in the national context if this does not interfere with integration of the markets of EU Member States. Legal regulatory tendencies require that the features of typical public relations management should be expanded and amended on the basis of an efficiency and flexibility paradigm [27, 21-22]. A very important role in the protection of IPR in international trade is played by customs. In the 21st c. economic globalization, modern international trade and such phenomenon as terrorism or contraband using the latest technologies, dictate the change in functions of customs. This leads to the need to analyse input and prospects of customs in the implementation of international agreements, EU and national legislation [29, 31-33]. The customs is supplied with modern international trade flow control instruments and, having enough information on trademarks, can protect them; therefore higher numbers of business subjects contact customs for customs supervision (see Fig. 4).

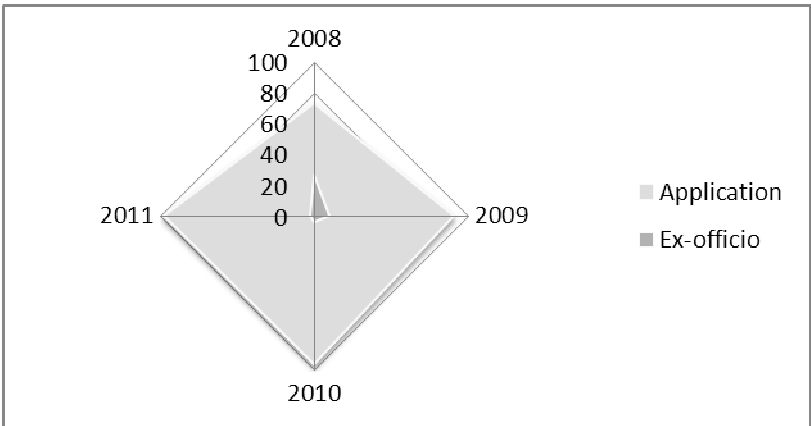


Fig. 4. Breakdown of cases by type of intervention⁶

⁶ The graph is based on the Report on EU customs enforcement of intellectual property rights. Taxation and Customs Union. Results at the EU border—2011.

The diagram clearly shows that only a small per cent of IPR infringements are solved by customs on their own initiative. The analysis of practical situation data suggests a relatively positive development of partnership between customs and business.

IPR protection in Lithuania, following Western traditions, became more applicable since 1993 June 3—after the adoption of Trademarks and Service Marks Law⁷, which set the formation of regulatory model according to the standards of Directive 89/104/EEB. The partnership of customs and business overcame all obstacles and now meets almost all EU requirements. IPR subjects contact customs with requests for customs supervision and this improves IPR protection (see Fig. 5).

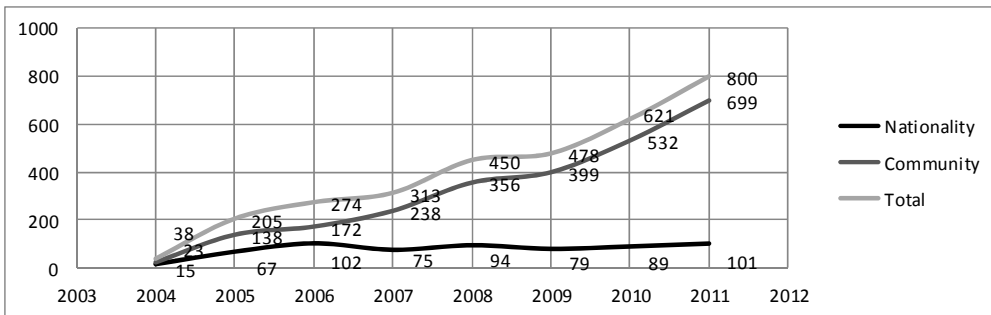


Fig. 5. Dynamics applications to Lithuanian customs for customs action

A much more complex situation remains in the inclusion of civil society in the process of IPR protection—there is very weak or no organizations of third sector, this means that there is no network of organizations, concerned with IPR, created; models promoting sustainable development are not implemented [10, 565-577]. According to modern public relations management principles, forces in support of PNO security should consist of State institutions, business and civil society structures [14,11; 256-258].

Scientific analysis of practice leads to a conclusion that in Lithuania the IP protection system is flawed because of the weakness of the III sector, which represent the interests of final consumers of CB. The third sector is significant because it organizes society to act as a moral pressure. Therefore it is necessary in solving qualitative problems of international business, increasing social awareness of the state, business and civil society organizations. Unlike political campaigns which are often politically motivated and set against business enterprises or corporations, their impact and pressure is more valued.

The systematic fragment of Lithuanian organizations, taking part in ensuring PNO protection (see Fig. 6) show structural (segment) diversity and helps to understand the complexity of the problem (research topics) and it also reveals the weaknesses and threats of public relations management. Preliminary studies of opinions of final con-

⁷ Trademarks and Service Marks Law of the Republic of Lithuania No. I-173 and later version (V. Žin., 1993, No. 21-507; 1994, No. 89-1722; 1997, No. 108-2733).

sumers reveal that they do not usually think of the consequences of illegal activity and that because of the lower prices, a majority of them are in support of contraband of counterfeit or original products. Social responsibility is an on-going process—deliberately introduced value, oriented to the changes of social consciousness. This means that it is necessary to seek effectiveness and flexibility of all concerned, also using modern innovative management means. In other words, it is necessary to abandon irrational and groundless position “to moralize” business activity with the rules of moral or political philosophies, liberal egalitarian or social doctrines, popular in the past [4, 89].

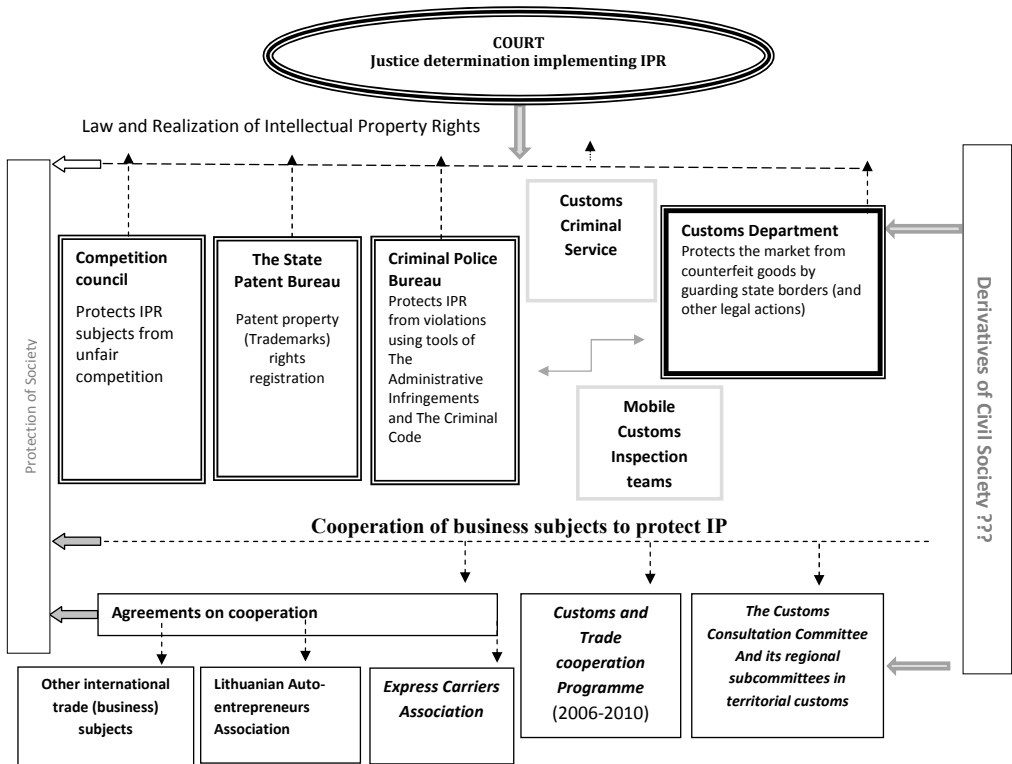


Fig. 6. Systematic fragment of Lithuanian organisations ensuring IPR protection

4. Conclusion

Due to the limited size of this article, the author attempts to reveal the relevance of the problem and to draw the reader's attention to the opportunities of applying modern management principles in IPR protection-spur practitioners and researchers to focus on the development of socially aware and responsible society. To change the current situation, firstly, it is essential to bring practitioners and scientists together to implement projects, such as those listed below:

1. To analyse the perception of individuals interested in sustainable development, socio-economic justice; identify key-needs, their diversity and tendencies in developing social responsibility in the field of IPR protection;
2. To perform an analysis of the markets of Lithuania and neighbouring countries, to determine the extent of counterfeit products in circulation there.

Traditional techniques of public relations management do not meet the needs of the time; therefore, a new model of partnership, based on an innovative management, has to be developed. Its goal is to set conditions to increase the country's responsibility in protecting INT by revealing the threat of counterfeit products to well-being, the economy and public safety.

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INTELEKTINĖS NUOSAVYBĖS APSAUGOS MODERNIZAVIMAS GINANT VARTOTOJŲ TEISES

Alfonsas LAURINAVIČIUS

Santrauka. Straipsnis parengtas įgyvendinant Lietuvos mokslo tarybos projektą „Piliečių ir vartotojų socialinio ekonominio teisingumo suvokimo formavimo gairės“. Nagrinėjama viena iš socialinio teisingumo suvokimo problemų – kaip užtikrinti galutinio produkto vartotojo saugą, prekės ženklo patikimumą.

Lietuva ribojasi su valstybių, turinčių skirtingą akcizų, muitų, prekių ir kitų produktų kainų politiką, ekonomine erdve. Tai palanki terpė kilti kontrabandos ir falsifikuotų prekių tiekimo grėsmei, neigiamai veikiančiai visuomenės saugą ir saugumą, taip pat ekonomiką bei verslą, iškreipiančiai teisinės demokratinės visuomenės bendrabūvio principus, moralines nuostatas. Intelektinė nuosavybė, kaip žmogaus kūrybinės veiklos produktas, yra saugoma teisinėmis ir kitomis priemonėmis. Prekių ir kiti komerciniai ženklai yra specifiniai pramoninės nuosavybės objektai. Straipsnyje atskleidžiama, kad jie yra itin reikšmingas būdas, arba priemonė, kovojant dėl pirmavimo rinkoje bei apsaugant rinką nuo klastočių.

Prieš porą dešimtmečių INT pažeidimai daugiausia žalos darė vidaus rinkoms. Šiuo metu vis daugiau grėsmių kelia tarptautinei prekybai, jos raidai. Statistikos duomenų analizės pagrindu

du straipsnyje pristatoma sulaikomų klastočių dinamika. Pažymėtina, kad grafikas, vaizduojantis prekių sulaikymą vienetais, rodo mažėjimo tendencijas. Tai atskleidžia naujas prekių ženklų pažeidimų tendencijas – sparčiai daugėja mažų krovinių (elektroninė prekyba, pašto paslaugos ir pan.) gabenimo srityje. Atkreipiamas skaitytojo dėmesys į tai, kad mūsų laikmečio grėsmių rinkos saugumui neįmanoma įveikti tradiciniais socialinio bendrabūvio reguliavimo metodais. Straipsnyje, remiantis statistikos duomenų, praktinės patirties analize, keliamos problemos ir skatinama ieškoti naujų vadybos modelių. Vienas iš jų – šios veiklos koordinavimas ir pajėgų kūrimas telkiant valstybės, verslo ir pilietines bendruomenes. Pateikiamos socialiai orientuoto procesų valdymo modelio kūrimo gairės.

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Alfonsas Laurinavičius – Mykolo Romerio universiteto Ekonomikos ir finansų valdymo fakulteto Tarptautinės prekybos ir muitų katedros vedėjas, profesorius, socialinių mokslų daktaras. Daugiau kaip 50 mokslinių straipsnių, 2 monografijų (kelių monografijų bendraautorius), 7 vadovėlių ir mokymo-metodinių leidinių autorius. Pagrindinės tyrimų sritys: tarnybinė teisė ir įstaigų valdymas, organizacijų socialinė atsakomybė, intelektinės nuosavybės teisių apsauga.